UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-81710-CIV-MARRA

DARRYL ASHMORE,

Plaintiff,

v.

NFL PLAYER DISABILITY &
NEUROCOGNITIVE BENEFIT PLAN,

Defendant.
_____/

ORDER

This Cause is before the Court upon Plaintiff Darryl Ashmore's and Defendant NFL Player Disability and Neurocognitive Benefit Plan's (the "Plan") cross-motions for summary judgment (DE 39, 40). The motions are fully briefed. (DE 42, 43, 44, 45.) The Court has considered the motions and the entire administrative record and is otherwise fully advised in the premises. For the reasons stated below, Plaintiff's Motion for Summary Judgment (DE 40) is granted, and Defendant's Motion for Judgment on the Administrative Record (DE 39) is denied.

I. FACTUAL BACKGROUND

Plaintiff submitted an application for total and permanent disability benefits on September 26, 2015. (DE 39-4 at 2.)

Under the Plan, upon review of an application for benefits, the Disability Board or the Disability Initial Claims Committee ("Committee") may require a player to submit to medical examination(s). Under Section 3.2(c), the Plan further provides as follows:

> If a Player fails to attend a scheduled examination, his application for T &P benefits will be denied, unless the Player provided at least two business days advance notice to the Plan Office that he was unable to attend. The Disability Board or the Disability

> Initial Claims Committee, as applicable, may waive the rule in the prior sentence if circumstances beyond the Player's control preclude the Player's attendance at the examination.

(DE 39-3 at 13.)

Defendant has admitted that it "has discretion to grant a player's request for accommodations related to any scheduled medical examination." (DE 40-1 at 4.)

By letter dated October 9, 2015, Plaintiff was informed by Elise Richard, Plan Benefit Coordinator, that the following three medical examinations had been scheduled for him: (1) Neurological evaluation with Eric Brahin, M.D., on October 16, 2015 in San Antonio, Texas; (2) Orthopedic evaluation with Chaim Arlosoroff, M.D., on October 20, 2015 in North Palm Beach, Florida; and (3) Neuropsychological evaluation with Rodney Vanderploeg, Ph. D., on October 22, 2015 in Tampa, Florida. (DE 39-4 at 13-18.)

In response, Plaintiff, through counsel, sent written correspondence dated October 13, 2015 to Richard objecting to the examinations and making a request for accommodations, as follows:

> We have been provided with three (3) notices regarding three separate examinations by physicians chosen by the NFL Plan. Written notification was given only seven (7) days prior to the first examination, which presents scheduling difficulties, but the bigger issue is that the three examinations are scheduled to take place in three different cities (one in another state entirely) all within a span of seven (7) days. According to Google Maps, the Plan would have Mr. Ashmore travel 8 hours and 30 minutes on a round trip flight from Florida to San Antonio, Texas (not to forget the travel time by car, both ways, to and from the Florida and Texas airports) on October 15, 2015 to return the next day, then travel 1hour and 17 minutes round trip by car to the North Palm Beach, Florida examination on October 20, 2015, and then travel again for approximately 7 hours round trip by car to the Tampa Bay, Florida examination only two days later.
>
> The concern is that Mr. Ashmore's medical condition will be exacerbated by long distance travel. Mr. Ashmore has no objection to submitting to examinations, but we are struck by the fact that the NFL Plan cannot locate physicians within reasonable driving distance to Mr. Ashmore's residence in Florida. While the NFL Plan may

> exercise its right under the Plan to have Mr. Ashmore examined, the exercise of that right must be reasonable and understanding of the physical and cognitive health of the individual.
>
> Accordingly, we request that any examination be scheduled at a location within 45 minutes travel by car of his residence. To reiterate, Mr. Ashmore is ready and willing to submit to examinations and merely ask that his medical restrictions and limitations be taken into consideration. There should be no difficulty in locating a physician in or around the area of his residence. Please let us know as soon as possible if the NFL Plan will be kind enough to reschedule the examinations or instead insist upon Mr. Ashmore presenting himself at the time and places in the notices. I will be in my office all week and will make myself accessible to you should you wish to reach me.

(DE 39-4 at 20-21.)

In an e-mail dated October 14, 2015, Richard responded that she could "reschedule these evaluations, but they will not be any closer." (DE 40-5 at 8.) Richard explained that "these doctors are the closest to Mr. Ashmore." (*Id.*)

In a letter dated October 14, 2015, Plaintiff, through counsel, responded to Richard's e-mail as follows:

> Thank you for getting back to me this morning via email. According to your email, the examinations can be rescheduled, but will not be any closer because these doctors are the closest to him. The problem is that Mr. Ashmore, who is about 6'7" and over 300 pounds, just physically cannot endure travel due to chronic pain in his neck, knees, and back, especially by plane since he will be restricted to a small airplane seat for a prolonged period of time with his legs bent, and then he has to navigate the walk into and out of security check point before jumping in a cab ride.
>
> All this travel is just not possible. Undergoing medical examinations are fine with Mr. Ashmore, but he is very concerned about being asked to travel in this manner. We will have to confirm with his physician as to whether the current examination locations pose a concern to Mr. Ashmore's well-being. We hope to have a response soon, and we can then proceed from that point. Meanwhile, we would appreciate it very much if the examinations can be postponed and we will work together to reschedule.
>
> Thank you for your attention to this matter, and for promptly responding to my letter.

(DE 39-4 at 25.)

On October 15, 2015, Plaintiff, through counsel, transmitted to Richard a letter prepared by Dr. Frank Conidi, which reads as follows:

> Daryl Ashmore is currently under my care for low back pain and lumbosacral radiculopathy, as well as cervical pain. He is also being evaluated for neurocognitive deficits sustained from multiple concussion and sub-concussive hits sustained while playing in the NFL. He has stated to me that he is being required to seek a medical opinion from a specialist in San Antonio TX and would need to fly to the appointment. His chronic back issues and radicular symptoms preclude him from flying, especially flights over an hour as he experiences significant exacerbation of his pain. I am recommending he be evaluated by physicians based out of Florida, preferably within a one hour drive of his home in the Ft. Lauderdale/Palm Beach area.

(DE 39-4 at 30.)

In response to these medical concerns, by letter dated October 14, 2015, Richard cancelled the medical examinations. In the letter, Richard stated, "Because you were unable to attend the scheduled appointments with the Plan's neutral physicians and requested them to be rescheduled for a later date, the Plan will not process your application for disability benefits further until you attend the neutral examinations." (DE 39-4 at 27.)

Later, by letters dated October 16, 2015, Richard modified the schedule of Plaintiff's medical examinations so that they would all occur in Atlanta, Georgia, as follows: (1) Neuropsychological evaluation with Stephen Macciocchi, PhD., on November 3, 2015; (2) Neurological evaluation with Barry McCasland, M.D., on November 2, 2015; and (3) Orthopedic evaluation with David Apple, M.D., on November 4, 2015. (DE 39-4 at 32-37.) The neuropsychological evaluation was scheduled to occur all in one day over a seven-hour period from 8:30 a.m. to 4:30 p.m. (*Id.*)

Highlighting Plaintiff's difficulty with sitting for protracted periods of time, by letter dated

October 27, 2015, Plaintiff, through counsel, sought accommodations for the Atlanta examinations, as follows:

> . . . When we last spoke, you had suggested I write back a letter, which you would take to the committee for consideration. As such, kindly present this letter to the committee so that they may be aware of the difficulty we are experiencing with scheduling the medical examinations due to Mr. Ashmore's physical disabilities. As previously stated, Mr. Ashmore is willing to submit to all examinations.
>
> Currently, a total of three examinations have been scheduled to take place in Atlanta, Georgia, over the course of three back-to-back days (November 2, 3, and 4). We reiterate that Mr. Ashmore is incapable of traveling long distances and wonder why examinations must be in outside of his county in Florida, much less an entirely different state. In any event, and in hope of moving forward, Mr. Ashmore will attend examinations in Atlanta if he can be accommodated.
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> We are asking that Mr. Ashmore's three examinations be broken-up into two separate trips to Atlanta. One trip would be for the neuropsychological evaluation and the other trip for the other two examinations. As for the neuropsychological evaluation, it is currently scheduled to take place from 8:30AM to 4:30PM, but Mr. Ashmore cannot sit for protracted periods of time. Therefore, this examination should be scheduled to take place over a period of two or three days. Our clients have had such accommodations in similar circumstances. In terms of the actual travel to and from Atlanta, Mr. Ashmore will need to be assigned a seat on the aircraft that has extra leg room. As you may recall, Mr. Ashmore is a giant of a man, weighing over 300 pounds and standing over six and a half feet tall. He simply cannot sit on a flight without accommodating for his physical conditions. A car service to and from both airports, both ways, as well as assistance carrying his luggage throughout the airport would also be necessary.
>
> These accommodations are necessary for the examinations to proceed and are reasonable in light of this particular person's stature and medical conditions. Kindly let me know the NFL Plan's response as we do hope to proceed.

(DE 39-4 at 39-40.)

In response to Plaintiff's request for accommodations, Richard e-mailed the neuropsychological doctor, Dr. Macciocchi and asked whether "the neuropsych testing be broken up into two days due to [Plaintiff] not being able to sit for protracted periods of time." (DE 40-4 at

32.)

In addition, Richard e-mailed Paul Scott, Director of Disability Benefits, and asked, "Since they want to break it up into two trips anyway, maybe Vanderploeg can do it if Macciocchi can't since he is closer?" (DE 40-4 at 29.) In reply, Scott stated, "I would try to stick with Macciocchi." (DE 40-4 at 29.)

In response to Richard's inquiry, Dr. Macciocchi stated as follows: "If he is scheduled for next week, we are booked the entire week. We will give him frequent breaks and most players have similar problems and manage to make it through." (DE 40-4 at 32.)

By e-mail dated the morning of October 28, 2015, Richard informed Plaintiff, through counsel, that while Plaintiff could make travel accommodations with the travel company, the neuropsychological doctor could not break up the examination due to the doctor's full schedule. She stated, "Thus all three evaluations are still scheduled for 11/2, 11/3, and 11/4 in Atlanta." (DE 40-4 at 39.)

Several minutes later at 9:03 a.m. on October 28, 2015, Plaintiff, through counsel, sent Richard a responsive e-mail, inquiring whether Plaintiff's request for accommodations had been presented to the appropriate authority, as follows:

> Did you present my letter to the committee so Mr. Ashmore's situation can be given proper consideration.
>
> I understand that you are only coordinating the examinations, but we need the issue of his disability, travel, and prolonged sitting to be addressed properly. It's not good enough to say you have to go because we said so.
>
> I would like to hear from the committee or whoever has authority about accommodations for Ashmore.

(DE 40-4 at 41.)

Richard forwarded Plaintiff's e-mail to Scott and wrote, "Well there you go. . ." (DE 40-41 at 41.) Scott responded in an e-mail to Richard, "Go ahead and present him and he will get a formal 'you got to go' from the DICC." (DE 40-4 at 41.)

By 9:13 a.m. on Wednesday, October 28, 2015, Richard had, in fact, cancelled all three medical examinations. (DE 40-4 at 31, 33, 35.)

Later that day, in response to Plaintiff's counsel's e-mail requesting that the request for accommodations be presented to the Committee, Richard responded in an e-mail to Plaintiff, through counsel, as follows: "I will be presenting everything to the Committee." (DE 40-4 at 39.)

In a letter dated November 3, 2015, the Committee informed Plaintiff that his application for benefits had been denied. (DE 39-7 at 95.) The sole reasoning provided in the letter for the denial is as follows:

> On November 2, 2015, the Committee considered your application for T&P benefits and noted that you failed to attend the scheduled appointment with a Plan neutral physician. Because you failed to submit to a physical examination and failed to provide sufficient notice, the Committee concluded that you are not entitled to T&P benefits under Section 3.2(c) of the Plan. The Committee denied your application for this reason.

(*Id.*)

In a letter dated August 24, 2016, Plaintiff was informed that the Disability Board had affirmed the denial of benefits. (39-8 at 441.) The Board gave the following reasoning for its affirmance:

> At its November 2, 2015 meeting, the Committee denied your application for T&P benefits pursuant to Plan Section 3.2(c) because you failed to attend three scheduled appointments with a Plan neutral physician without providing at least two business days advance notice to the NFL Player Benefits Office.
>
> By letter dated May 4, 2016, your attorney, Edward Dabdoub, appealed the Committee's initial decision to the Disability Board and submitted additional medical

> records. In the appeal letter, Mr. Dabdoub conceded that you did not attend several Plan neutral examinations, but he stated that you informed the NFL Player Benefits Office in advance of your inability to travel.
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> At its August 17, 2016 meeting, the Disability Board reviewed your appeal and unanimously determined that your failure to attend three scheduled medical examinations, without providing at least two business days advance notice to the NFL Player Benefits Office, renders you ineligible for T&P benefits under Plan Section 3.2(c). The Disability Board considered Mr. Dabdoub's explanation for your failure to attend, but it found no evidence of your attempt to provide at least two business days advance notice of your inability to attend the previously scheduled examinations. The Disability Board also found that your explanation does not constitute the type of circumstances beyond your control that would allow the Disability Board to waive the failure-to-attend rule stated in Section 3.2(c).

(*Id.*)[1]

II. PROCEDURAL BACKGROUND

Plaintiff has filed a Complaint against Defendant, seeking total and permanent disability benefits and attorney's fees pursuant to 29 U.S.C. §1132. (DE 1.) The matter is now before the Court upon the parties' cross-motions for summary judgment/judgment on the administrative record.

III. LEGAL STANDARD

A. Summary Judgment

The Court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The movant "bears the initial responsibility of informing the district court of the basis for its

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[1] Plaintiff filed a second application for benefits in February 2018, and was found to be totally and permanently disabled. (DE 53.) The award of benefits, however, has no bearing on the Court's resolution of the issues at hand.

motion, and identifying those portions of [the record,] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325. The material in the record must be viewed in a light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

After the movant has met its burden under Rule 56(a), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . .; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) and (B).

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 257 (1986). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

B. Review of Benefits Decision

The Eleventh Circuit has provided a helpful guide "[f]or a court reviewing a plan administrator's benefits decision":

> (1) Apply the *de novo* standard to determine whether the claim administrator's benefits-denial decision is "wrong" (i.e., the court disagrees with the administrator's decision); if it is not, then end the inquiry and affirm the decision.
>
> (2) If the administrator's decision in fact is "*de novo* wrong," then determine whether he was vested with discretion in reviewing claims; if not, end judicial inquiry and reverse the decision.
>
> (3) If the administrator's decision is "*de novo* wrong" and he was vested with discretion in reviewing claims, then determine whether "reasonable" grounds supported it (hence, review his decision under the more deferential arbitrary and capricious standard).
>
> (4) If no reasonable grounds exist, then end the inquiry and reverse the administrator's decision; if reasonable grounds do exist, then determine if he operated under a conflict of interest.
>
> (5) If there is no conflict, then end the inquiry and affirm the decision.
>
> (6) If there is a conflict, the conflict should merely be a factor for the court to take into account when determining whether an administrator's decision was arbitrary and capricious.

Blankenship v. Metro. Life Ins. Co., 644 F.3d 1350, 1355 (11th Cir. 2011)

Both parties agree that this Court's review is limited to determining whether (1) Defendant benefits-denial decision is *de novo* "wrong," and, (2) if it is, then whether it was reasonable or arbitrary and capricious.

IV. DISCUSSION

A. Decision to Deny Benefits was Wrong

Turning to the first step in the aforementioned legal framework, the Court must first ask whether the claim administrator's benefits-denial decision was "wrong" (i.e., whether the Court agrees with the administrator's decision). *Blankenship*, 644 F.3d at 1355. " 'Wrong' is the label used by [this circuit's] precedent to describe the conclusion a court reaches when, after reviewing the plan

documents and disputed terms *de novo*, the court disagrees with the claims administrator's plan interpretation." *Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1232 (11th Cir. 2006) (citation and internal quotation marks omitted).

In this case, the Committee and the Board based their decisions to deny benefits on a provision of the Plan that provides that benefits will be denied if a player "fails to attend a scheduled examination" unless the player "provides at least two business days advance notice to the Plan Office that he was unable to attend." (DE 39-3 at 13.) In denying benefits, the Committee pointed to Plaintiff's failure to attend the November 2, 2015 examination and explained that "[b]ecause [Plaintiff] failed to submit to a physical examination and failed to provide sufficient notice, the Committee concluded that [Plaintiff] [is] not entitled to T&P benefits under Section 3.2(c) of the Plan." (DE 39-7 at 95.) The Disability Board reviewed Plaintiff's appeal and "unanimously determined that [Plaintiff's] failure to attend three scheduled medical examinations, without providing at least two business days advance notice to the NFL Player Benefits Office, render[ed] [him] ineligible for T&P benefits under Plan Section 3.2(c)." The Board stated that it had "considered [Plaintiff's counsel's] explanation for [Plaintiff's] failure to attend, but it found no evidence of [Plaintiff's] attempt to provide at least two business days advance notice of [Plaintiff's] inability to attend the previously scheduled examinations. The Disability Board also found that [Plaintiff's] explanation does not constitute the type of circumstances beyond your control that would allow the Disability Board to waive the failure-to-attend rule stated in Section 3.2(c)." (39-8 at 441.)

After careful review, the Court concludes that reliance on Section 3.2(c) to justify the denial of benefits was misplaced and incorrect under the unique circumstances of this case. Based upon

his chronic back issues, Plaintiff requested an accommodation as to his medical examinations so that he did not need to sit for a protracted period of time. Specifically, Plaintiff asked that the three medical examinations in Atlanta be broken-up into two separate trips to Atlanta[2] and that the neuropsychological evaluation "take place over a period of two or three days." (DE 39-4 at 39-40.)

Plaintiff's correspondence with Defendant twice asked that his request for accommodations be presented to the Committee and the record reflects that, twice, Defendant agreed to do so. In his first letter concerning Atlanta accommodations, which was dated October 27, 2015, Plaintiff wrote as follows:

> When we last spoke, you had suggested I write back a letter, which you would take to the committee for consideration. As such, kindly present this letter to the committee so that they may be aware of the difficulty we are experiencing with scheduling the medical examinations due to Mr. Ashmore's physical disabilities. As previously stated, Mr. Ashmore is willing to submit to all examinations.

(DE 39-4 at 39-40.) As indicated in the October 27, 2015 letter, Richard agreed to take Plaintiff's letter requesting accommodations to the Committee. (*Id.*)

In a second communication dated October 28, 2015, following Richard's denial of Plaintiff's request, Plaintiff again asked "to hear from the committee or whoever has authority about accommodations" (DE 40-4 at 41.) In particular, Plaintiff's counsel stated:

> Did you present my letter to the committee so Mr. Ashmore's situation can be given proper consideration. I understand that you are only coordinating the examinations, but we need the issue of his disability, travel, and prolonged sitting to be addressed properly. It is not good enough to say you have to go because we said so. I would like to hear from the committee or whoever has authority about accommodations for Ashmore.

(DE 40-4 at 41.) Again, it is clear from Plaintiff's counsel's e-mail that Plaintiff reiterated his

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[2] Plaintiff asked that one trip be for the neuropsychological evaluation, which was scheduled to last seven hours, and the other trip for the other two examinations.

request that his objections to the scheduling and spacing of the Atlanta examinations be presented to the Committee. (*Id.*) Richard then cancelled the examinations (DE 40-4 at 31, 33, 35), and in a direct response to Plaintiff's counsel, stated in an e-mail that she would "present[] everything to the Committee." (DE 40-4 at 39.)

Based upon the Court's review of the correspondence, as of October 28, 2015, both parties understood that the medical examinations were no longer scheduled.[3] Plaintiff twice asked in writing, once even at Richard's suggestion, to have his accommodations request presented to the Committee. Richard then cancelled the examinations and agreed to present "everything" to the Committee. Thus, as of October 28, 2015, with only three business days to the first examination, the parties were in agreement that examinations were no longer scheduled and the issue of future scheduling and spacing of the medical examinations would be presented to the Committee. As of November 2, 2015, the date of the first medical examination, the Committee still had not made a decision on Plaintiff's request for accommodations.

Because Plaintiff's request for accommodations had not been resolved, the Court concludes that it was wrong and incorrect to deny benefits on the basis of Plaintiff's failure either to attend the medical examinations or his failure to give notice of an inability to attend under Section 3.2(c). The notice and forfeiture provisions of Section 3.2(c) apply to "scheduled examination[s]." The term "scheduled examination" in the Plan can only be interpreted to mean an examination that is planned to occur according a schedule. *See e.g.*, Oxford English Dictionary ("scheduled" means "included in or planned according to a schedule"). Here, however, the scheduling of the examinations was

[3] The request for accommodations implicated all three medical examinations, since it was unclear how Defendant would proceed with breaking up the various examinations.

subject to a request for accommodations that both parties understood was unresolved at the time of the examinations. The parties understood that the medical examinations were not going forward as previously scheduled. On the contrary, just three business days before the first examination on the schedule, Plaintiff demanded that his request for accommodations be presented to the Committee, and Defendant cancelled all three examinations with the corresponding doctors. (DE 40-4 at 31, 33, 35.)[4] When a player's request for accommodations due to a medical condition is pending and unresolved at the time of a previously scheduled examination, the Court concludes that the medical examination does not fall under Section 3.2(c), such that the Plan cannot withhold benefits for failure either to attend the examination or to provide notice. A contrary reading of Section 3.2(c), one that punishes a player for failing to attend an examination despite a pending accommodations request, would encourage players to forgo the possibility of obtaining a favorable decision on his accommodations request (and endure unnecessary physical pain and discomfort) or risk forfeiting all benefits.

For all of these reasons, the Court concludes that Defendant's decision to deny benefits on the basis of Plaintiff's failure to attend the medical examinations was wrong.

B. Decision was Arbitrary and Capricious

Next, applying the more deferential arbitrary and capricious standard, the Court considers whether "reasonable" grounds supported Defendant's decision. *Blankenship*, 644 F.3d at 1355.

[4] The fact that the Plan took it upon itself to contact the doctors and cancel the examinations several days before the examinations were going to take place demonstrates the Plan's understanding that the parties were not going to forward with the examinations. Even if Defendant had not cancelled the examinations with the doctors, however, the communications between Defendant and the player alone demonstrate that the parties understood that the examinations were not going to go forward as originally scheduled because of the pending accommodations request.

Based upon a careful review of the evidence, the Court concludes that reasonable grounds did not support Defendant's decision.

The Plan cannot reasonably expect a player to attend an examination that is subject to an unresolved request for accommodations. Here, Defendant offered assurances to Plaintiff that his request for medical-examination accommodations would be considered by the Committee, it cancelled the examinations consistent with that assurance, and then turned around and denied him benefits for his failure to attend the subject examination. As a result of Defendant's assurances that Plaintiff's request for accommodations would be presented to the Committee just three business days before the start of the subject examinations, and without a resolution on his request, Plaintiff cannot reasonably be faulted for his failure to attend the examinations or failure to give notice. In other words, the Plan could not reasonably determine that a medical examination that is subject to an unresolved accommodations request falls under Section 3.2(c). As noted above, such a reading of Section 3.2(c) is unreasonable because it would encourage players to forgo the possibility of obtaining a favorable decision on an accommodations request and endure unnecessary physical pain and discomfort or risk forfeiting all benefits.

This conclusion is buttressed by the record evidence that less than one month before Defendant's denial of benefits, Richard seemingly excused Plaintiff's attendance at the October 2015 medical examinations due to the pendency of an unresolved earlier request for accommodations.[5] (DE 39-4 at 27.) Although not critical to the Court's conclusion, the Court notes that it was arbitrary and capricious to deny Plaintiff's application for benefits based upon his failure to attend the

[5] Plaintiff's request for accommodations was based upon the pain and discomfort Plaintiff would suffer from long flights.

November examinations when Defendant excused Plaintiff's attendance at the October examinations due to an earlier accommodations request.

It defies all reason and common sense to deny benefits to a player for a missed medical examination when neither party was under the impression that the examination would go forward as previously scheduled due to a pending accommodations request. The player's request for medical-examination accommodations in this case was unresolved and the examination date had been cancelled.

Because no reasonable basis exists for the decision, the Court concludes that the Board's denial of benefits to Plaintiff was arbitrary and capricious.

V. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Summary Judgment (DE 40) is **GRANTED** and Defendant's cross-Motion for Judgment (DE 39) is **DENIED**. The Motion to Strike (DE 47) is **DENIED** as moot. Plaintiff is awarded past-due monthly T&P disability benefits,[6] plus pre-judgment interest and attorney's fees. The Court will enter judgment for Plaintiff by separate order. The parties are ordered to confer and submit a proposed judgment to the Court within ten (10) days of the date of this Order.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 15th day of June, 2018.

KENNETH A. MARRA
United States District Judge

[6] In light of Defendant's subsequent determination that Plaintiff is totally and permanently disabled and subsequent of award of benefits, the parties agree that a remand is not necessary. (DE 53.)